

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of)	
)	
Consumer and Governmental Affairs Bureau)	CG Docket No. 18-152
Seeks Further Comment on Interpretation of)	
the Telephone Consumer Protection Act in)	
Light of the Ninth Circuit’s <i>Marks v. Crunch</i>)	
<i>San Diego, LLC</i> Decision)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

COMMENTS OF TCN INC.

TCN Inc. (“TCN”) respectfully submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Consumer and Governmental Affairs Bureau’s Public Notice seeking comment on Telephone Consumer Protection Act (“TCPA”) issues in light of the recent *Marks v. Crunch San Diego, LLC* decision¹ and to supplement the record developed in response to the Commission’s Public Notice seeking comment after the D.C. Circuit’s *ACA International* decision.² As discussed below, in light of the *ACA International* and *Marks* decisions, now is the time for the Commission to provide a reasonable interpretation of “automatic telephone dialing system” (“ATDS”) that is consistent with the statutory language of the TCPA and congressional intent. Specifically, TCN encourages the Commission to reject the

¹ *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit’s Marks v. Crunch San Diego, LLC Decision*, Public Notice, CG Docket Nos. 18-152, 02-278, DA 18-493 (rel. Oct. 3, 2018); *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018).

² *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, Public Notice, CG Docket Nos. 18-152, 02-278, DA 18-493 (rel. May 14, 2018); *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

Marks court’s approach and confirm that the term ATDS only includes equipment that has and uses a random or sequential number generator to store or produce numbers and dials those numbers without human intervention.

About TCN

TCN is a leading provider of cloud-based call center technology for enterprises, contact centers, and collection agencies worldwide.³ Founded in 1999, TCN combines a deep understanding of the needs of call center users with a highly affordable delivery model, ensuring immediate access to robust call center technology, including interactive voice response, call recording, and business analytics required to optimize operations and adhere to TCPA regulations. Its “always-on” cloud-based delivery model provides customers with the ability to quickly and easily scale and adjust to evolving business needs. TCN serves a number of Fortune 500 companies and enterprises in multiple industries, including newspaper, collection, education, healthcare, automotive, political, customer service, and marketing. TCN and its more than 1600 satisfied customers look forward to the adoption of a TCPA framework that better serves consumers and callers alike.

The Commission Should Reject the *Marks* Court’s ATDS Interpretation

The *Marks* court erred in its interpretation of the ATDS definition. Importantly, it erred by determining that Congress tacitly approved of the FCC’s prior ATDS interpretations when it amended the TCPA in 2015 without revising the ATDS definition.⁴

As a general matter, “congressional inaction is ... a tenuous basis upon which to infer much at all, even where a court’s or agency’s interpretation is fully accessible to the public and

³ See TCN, Inc., *TCN: Leading Provider of Cloud-based Call Center Technology*, TCN, <https://www.tcn3.com/about-tcn/> (last visited Oct. 17, 2018).

⁴ See *Marks* at 22.

to all members of Congress.”⁵ And the doctrine of legislative reenactment “does not apply when ‘the record of congressional discussion preceding reenactment makes no reference to the [interpretation].’”⁶

Congress amended the TCPA in 2015 by making a discrete addition to provide an exemption for federal debt collection communications.⁷ That amendment affected at most one type of *call* that was within the TCPA’s strictures, not the types of *equipment* subject to the TCPA, and therefore did not “provide additional information about Congress’ views on the scope of the definition of ATDS” despite the *Marks* court’s statement to the contrary.⁸

The *Marks* court erroneously “presume[d]” that Congress was knowledgeable about FCC decisions interpreting prior legislation⁹ and did not attempt to make the required showing that Congress considered the agency’s 2015 ATDS interpretation.¹⁰ Instead, the court should have found that where a statute is silent on an issue, it is “eminently reasonable” to conclude that Congress merely refused to tie the agency’s hands.¹¹ It should have deferred to the expertise of

⁵ *Civil Liberties Union v. Clapper*, 785 F.3d 787, 820 (2d Cir. 2015); see *OfficeMax, Inc. v. United States*, 428 F.3d 583, 595-96 (6th Cir. 2005) (citing *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (“We walk on quicksand when we try to find in the absence of corrective legislation a controlling legislative principle.”)).

⁶ See *OfficeMax*, 428 F.3d at 596 (citing *Brown v. Gardner*, 513 U.S. 115, 121 (1994)).

⁷ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584, 588 (codified at 47 U.S.C. § 227(b)(1)(A)(iii)).

⁸ See *Marks* at 22.

⁹ See *id.* (citing *Porter v. Bd. of Trs. of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1072 (9th Cir. 2002)).

¹⁰ Cf. *id.* at 21-23; see *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (“2015 Omnibus Order”).

¹¹ See *Veterans Justice Grp., v. Sec’y of Veterans Affairs*, 818 F.3d 1336, 1349-50 (Fed. Cir. 2016) (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009)).

the FCC to provide a reasonable interpretation of the ATDS definition in the wake of the D.C. Circuit's decision in *ACA International*.¹²

Even assuming *arguendo* that Congress' silence on the definition of ATDS indicates tacit approval, the theory of congressional ratification of interpretations of a statute by reenactment, or here, amendment, "cannot overcome the plain meaning of a statute."¹³ The *Marks* court misread the statute. It read the definition of an ATDS to mean that "using a random or sequential number generator" modifies only the word "produce" and not "store." The text of the statute does not allow that reading. As the *Sirius* court explained, "[t]he comma separating 'using a random or sequential number generator' from the rest of [the] subsection makes it grammatically unlikely that the phrase modifies only 'produce' and not 'store.'"¹⁴ Further, the Ninth Circuit's own "punctuation canon" requires the court to be mindful of the statute's grammar and syntax, which the court ignored when it created the ambiguity in the ATDS definition.

The *Marks* court was also wrong to compare the federal debt collection exemption to the TCPA's exception allowing a caller to use an autodialer to make calls "with the prior express consent of the called party."¹⁵ Again, this goes to the type of call made, not the way the call was made. In other words, Congress' decision not to apply the TCPA to certain types of recipients (those who consented to receive calls and those who received a call to collect a federal debt) does not mean that Congress meant to expand the definition of ATDS beyond equipment that uses a random or sequential number generator to also encompass equipment that requires human

¹² *ACA Int'l*, 885 F.3d at 692, 695.

¹³ See *Civil Liberties Union*, 785 F.3d at 819 (quoting *Demarest v. Manspeaker*, 498 U.S. 184, 187 (1991) ("[T]he theory of congressional ratification of judicial interpretations of a statute by reenactment cannot overcome the plain meaning of a statute.")).

¹⁴ *Pinkus v. Sirius XM Radio, Inc.*, __ F. Supp. 3d __, 2018 (N.D. Ill. July 26, 2018).

¹⁵ See *Marks* at 22.

intervention or dials from curated lists. Following this line of reasoning would subject nearly all computers and cell phones to TCPA liability, which Congress surely did not intend, as the D.C. Circuit recognized.¹⁶ And even if Congress did contemplate the meaning of ATDS when it adopted the federal debts exemption, it may have been focused on prerecorded or artificial voice calls that were Congress' target preceding the TCPA's enactment.¹⁷

The Commission Should Provide a Reasonable Interpretation of ATDS that is Consistent with the TCPA

TCN encourages the Commission to confirm that the term ATDS only includes equipment that has and uses a random or sequential number generator to store or produce numbers and dials those numbers without human intervention, including by granting the Petition for Declaratory Ruling filed recently by numerous leading industry associations.¹⁸ Doing so will help prevent further confusion and unwarranted TCPA litigation while continuing to protect consumers, and it will also support American call center jobs and help legitimate companies maintain and enhance their service to consumers.

The TCPA defines an automatic telephone dialing system as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”¹⁹ An ATDS is therefore equipment that “has the capacity” to store or produce numbers *using* a random or sequential number generator, and the TCPA only restricts as an ATDS equipment that both *has and uses* a random or sequential

¹⁶ See *ACA Int'l*, 885 F. 3d at 704; see also *2015 Omnibus Order*, Dissenting Statement of Commissioner Michael O’Rielly at 8088.

¹⁷ See *Marks* at 5 (citing S. Rep. No. 102-178, at 2 (1991) (explaining that Congress aimed to regulate telemarketing calls placed using machines that “automatically dial a telephone number and deliver to the called party an artificial or prerecorded voice message.”)).

¹⁸ Petition for Declaratory Ruling, U.S. Chamber Institute for Legal Reform, *et al.*, CG Docket No. 02-278 (May 3, 2018).

¹⁹ 47 U.S.C. § 227(a)(1).

number generator. If a random or sequential number is not installed, the equipment falls outside the TCPA.

TCN also encourages the Commission to confirm that “has the capacity” means the “present ability” of the equipment at the time of the call. Congress could have chosen a different tense and applied the definition to equipment that “had” or “could have” the capacity, but it did not, and the use of the present tense is instructive. Commissioner O’Rielly, too, supported this interpretation in his *2015 Omnibus Order* dissent. He said “it seems obvious that the equipment must have the capacity to function as an autodialer *when the call is made* not at some undefined future point in time.”²⁰

Moreover, the TCPA bars companies from using autodialers to “make any call” subject to certain exceptions. This indicates that the equipment must, in fact, be used as an autodialer to make the calls.²¹ Likewise, the D.C. Circuit noted that the Commission could interpret the statutory phrase “make any call . . . using [an ATDS],” to mean that a device’s ATDS capabilities must actually be used to place a call for TCPA restrictions to attach.²² The Commission should act on the court’s guidance and confirm that only equipment that uses a random or sequential number generator is subject to the TCPA’s restrictions, and that liability attaches only when such functionality is used for a call.

The Commission should also confirm that calls made with any degree of “human intervention” are not made using an ATDS. The Commission’s prior case-by-case approach to dialing equipment has caused significant confusion and incentivized frivolous litigation. Finding

²⁰ *2015 Omnibus Order*, Dissenting Statement of Commissioner Michael O’Rielly at 8088.

²¹ *See, e.g., id.*

²² *See ACA Int’l*, 885 F. 3d at 704.

that even a single click of human intervention (akin to speed dialing) pushes technology outside the definition of an ATDS creates a clear rule for businesses to follow and courts to enforce.

Conclusion

In light of the *ACA International* and *Marks* decisions, now is the time for the Commission to provide a reasonable interpretation of ATDS that is consistent with the statutory language of the TCPA and congressional intent. TCN encourages the Commission to reject the *Marks* court's approach and confirm that the term ATDS only includes equipment that has and uses a random or sequential number generator to store or produce numbers and dials those numbers without human intervention. Doing so will protect consumers while preventing further confusion and unwarranted TCPA litigation, and it will also support American call center jobs and enable legitimate companies to continue providing high-quality services to consumers.

Respectfully submitted,

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